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No. 00-201

IN THE
Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.;
THE TIME INCORPORATED MAGAZINE COMPANY;
LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,
Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY;
BARBARA GARSON; MARGOT MIFFLIN;
SONIA JAFFE ROBBINS and DAVID S. WHITFORD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF KEN BURNS, DORIS KEARNS GOODWIN, RICHARD N. GOODWIN, DAVID M. KENNEDY, DAVID MCCULLOUGH, JACK N. RAKOVE AND GORDON S. WOOD IN SUPPORT OF PETITIONERS

MICHAEL F. CLAYTON
Counsel of Record
BRETT I. MILLER
ANITA G. BLUMENTHAL
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF KEN BURNS, DORIS KEARNS GOODWIN, RICHARD N. GOODWIN, DAVID M. KENNEDY, DAVID MCCULLOUGH, JACK N. RAKOVE AND GORDON S. WOOD

Pursuant to Supreme Court Rule 37, Ken Burns, Doris Kearns Goodwin, Richard N. Goodwin, David M. Kennedy, David McCullough, Jack N. Rakove and Gordon S. Wood ("*amici*"), through their undersigned counsel, hereby respectfully move for leave to file the following brief *amicus curiae* in this case. The consent of the Petitioners has been obtained, and a letter reflecting same will be lodged with this Court. The consent of the Respondents has been sought but, as of the filing of this brief, no response has been received.

For the foregoing reasons, *amici* respectfully request leave to file the attached brief.

Respectfully submitted,

MICHAEL F. CLAYTON
Counsel of Record
BRETT I. MILLER
ANITA G. BLUMENTHAL
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

Attorneys for Amici Curiae

October 2, 2000

QUESTION PRESENTED

Whether a publisher's reproduction and distribution of its entire periodical not only in print, but also electronically, is privileged under the Copyright Act or instead infringes upon the copyright held by contributing freelance authors.

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Commission on Physical Sciences, Mathematics, and Applications, National Research Council, LC21: A Digital Strategy for the Library of Congress (2000) 8, 10

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INTERESTS OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of the petition is submitted by Ken Burns, Doris Kearns Goodwin, Richard N. Goodwin, David M. Kennedy, David McCullough, Jack N. Rakove and Gordon S. Wood ("*amici*"), pursuant to Rule 37 of the Rules of this Court.

Ken Burns is a filmmaker and author, widely known for his documentaries for public television. Mr. Burns' films include *The Civil War* and *Baseball*, each of which set records for public television viewership. Some of his other films include *Not for Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony*; *Lewis and Clark: The Journey of the Corps of Discovery*; *The Congress*; *Frank Lloyd Wright*; *The Statue of Liberty*; *Brooklyn Bridge*; *Huey Long*; and *Thomas Jefferson*. In addition to his work as a documentarian and biographer, Mr. Burns has also collaborated on several books, including *Jazz: An Illustrated History*; *The Civil War: An Illustrated History*; and *Baseball: An Illustrated History*. Mr. Burns has been nominated twice for an Academy Award and has won numerous Emmy Awards, as well as other honors. Mr. Burns is an active member of the Society of American Historians.

Doris Kearns Goodwin is an historian, commentator and author, widely known for her historical perspectives on American politics and political figures. Ms. Kearns Goodwin is the author of numerous highly acclaimed biographies, including the 1995 Pulitzer Prize-winning best-seller, *No Ordinary Time: Franklin and Eleanor Roosevelt—The Home Front in World War II*. In addition, Ms. Kearns Goodwin has contributed numerous articles on historical, political and cultural subjects to publications, including *The New York*

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Times, *The Atlantic Monthly*, *Life* and *Redbook*. She is a former professor of government at Harvard, and currently serves as a political commentator for NBC and the PBS program, *The News Hour with Jim Lehrer*.

Richard N. Goodwin is a political advisor and commentator as well as an historian and author. Mr. Goodwin served as a speech writer to President Lyndon Johnson and as an advisor to President John F. Kennedy. He has published several successful books on political subjects, as well as contemporary American life and culture, including *Remembering America: A Voice From the Sixties*; *Promises to Keep: A Call for a New American Revolution*; and *The Hinge of the World*.

David M. Kennedy is the Donald J. McLachlan Professor of History at Stanford University and a prolific author whose scholarship spans a wide range of historical subjects. With over ten books and numerous articles to his credit, Professor Kennedy has been awarded a variety of honors and awards, including the 2000 Pulitzer Prize for his comprehensive history of the Great Depression, the New Deal and World War II, *Freedom from Fear: The American People in Depression and War, 1929-1945*. Professor Kennedy is also co-author of *The American Pageant, a History of the Republic*, which is widely used as an undergraduate and high school advanced placement course textbook.

David McCullough is a well-known biographer, author, historian and scholar. He has written six biographies, including the 1993 Pulitzer Prize-winning, best-selling biography, *Truman*. In addition to the Pulitzer Prize, Mr. McCullough has received several other awards for his contributions to historical scholarship. Mr. McCullough also is active in the historical scholarly community. He serves as the president of the Society of American Historians and is a founding member of Protect Historic America.

Jack N. Rakove is a Professor of Political Science and the William Robertson Coe Professor of History and American Studies at Stanford University. Professor Rakove has written several books on the early American Republic, its politics and political figures, including the biography *James Madison and the Creation of the American Republic*. In 1997, Professor Rakove received the Pulitzer Prize in history for his best-selling book *Original Meanings: Politics and Ideas in the Making of the Constitution*. In addition to his teaching activities at Stanford and as a visiting professor at New York University School of Law, Professor Rakove is an active member of the American Historical Association, the Organization of American Historians, the Society for Historians of the Early American Republic and the Institute of Early American History.

Gordon S. Wood is an historian, author and Professor of History at Brown University, where he has been a faculty member since 1969. Professor Wood also has taught at Harvard University, the College of William and Mary, the University of Michigan and Cambridge University. He is the author of more than 50 publications, including *The Creation of the American Republic*, for which he won the Bancroft Prize in history and the John H. Dunning Prize. In 1993, Professor Wood received the Pulitzer Prize for his book *The Radicalism of the American Revolution*. Professor Wood is a past president of the Society for Historians of the Early American Republic, and he serves on the Board of Trustees for Colonial Williamsburg, Tufts University and the National Council for History Education.

As historians, political commentators and authors, *amici* have devoted much of their professional energies to developing, interpreting and analyzing the historical record of this country. As researchers and scholars, *amici* rely heavily on, and the quality of their work is dependent upon, the availability, reliability, accessibility and comprehensiveness of the nation's electronic repository of back issues of

newspapers, magazines, journals and other periodicals. Because the Second Circuit's decision in this case will have an unexpected, unprecedented and materially detrimental effect on the availability and integrity of the nation's electronic archives, *amici* urge the Court to grant certiorari and decide this matter on the merits.

SUMMARY OF ARGUMENT

The Second Circuit's decision in *Tasini* holds that publishers and those licensed to reproduce and distribute electronic copies of their collective works may not include works of freelance authors who have not explicitly granted the right to publish their individual contributions in such electronic copies. As interested parties on both sides of this case have acknowledged, the threat of lawsuits brought by freelance authors relying on the Second Circuit's decision will lead the nation's publishers and database providers to avoid the risk of copyright infringement liability by deleting freelance contributions included in the nation's electronic archives, and omitting certain works from electronic archives moving forward. In an era when libraries and other collecting institutions are rapidly replacing their print and microfiche/microfilm archives of newspapers, journals and other periodicals with searchable, full-text electronic counterparts, this result will have unexpected, unprecedented and irreversible consequences for the integrity and accessibility of the historical record and the progress of historical scholarship. Given the significance of this potential outcome, a writ of certiorari should be granted and the issue presented in this case definitively resolved by the Court.

ARGUMENT

The impact of digital technology on contemporary society and culture is ubiquitous and ever-expanding. For historians, researchers, scholars and students in countless disciplines, the comprehensive, searchable, full-text journal, periodical and newspaper database has become an irreplaceable and priceless resource. The advantages of digital storage and retrieval technology in terms of accessibility, efficiency, reliability and comprehensiveness as compared to traditional analog media (*i.e.*, hard copy bound volumes, microfilm and microfiche) are apparent, and have resulted in the proliferation of electronically available full-text archival resources. These advantages, coupled with the inefficiencies and costs associated with maintaining parallel analog collections of the same archival materials, have led collecting institutions throughout the nation (both big and small) to reduce significantly their investments in and reliance upon traditional analog means of information storage and retrieval.

The Second Circuit's decision in this case threatens both the integrity of this nation's historical record and the public's access to it. As a result of the Second Circuit's decision, and contrary to common custom and practice in existence since the advent of electronic media, publishers and database providers, including but not limited to Petitioners, cannot lawfully include past, current or future contributions of freelance authors without first explicitly obtaining rights for further electronic archival publication of their respective contributions. As a direct consequence of the likely expense and practical difficulties of locating and negotiating with individual freelance authors (or their heirs/assigns), publishers and database providers will opt either to erase the contributions of freelance authors currently included in full-text databases, or not include such contributions prospectively, rather than risk liability for infringement. The record below contains the uncontroverted testimony of publishers

and database providers in support of the certainty of this outcome[2] and the class action litigation filed against them in recent months underscores the gravity of their concerns.[3]

Amici submit that the resulting evisceration of electronic journal, newspaper and periodical archives compelled by the decision below will have irreversible adverse consequences for the integrity and accessability of the historical record, and the progress of historical scholarship and research generally. Accordingly, *amici* urge the Court to review the decision of the Second Circuit and definitively resolve the issue presented in this case.

I. ELECTRONIC JOURNAL, NEWSPAPER AND PERIODICAL ARCHIVES PROVIDE UNSURPASSED BENEFITS TO HISTORIANS AND SCHOLARS AND THUS HAVE BECOME INDISPENSABLE RESEARCH TOOLS.

The record of our time, as well as that of the past generation, has been and will increasingly become digitized.[4]

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[2] *See* Decl. of K.A. Tillman in Support of Defendant-Appellees' Motion for Stay of Mandate ¶¶ 6-16, April 11, 2000 (2d Cir. Docket No. 97-9181 (L), 97-9650 (CON)); Decl. of F.T. Leftrict, Jr. in Support of Defendant-Appellees' Motion for Stay of Mandate ¶¶ 7-11, April 11, 2000 (2d Cir. Docket No. 97-9181 (L), 97-9650 (CON)).

[3] *See Posner v. Gale Group*, No. 00-CV-2913 (N.D. Cal. complaint filed Aug. 14, 2000); *Authors Guild v. Dialog Corp.*, No. 00-CV-6049 (S.D.N.Y. complaint filed Aug. 15, 2000); *Laney v. Dow Jones & Co.*, No. 00-CV-00769 (D. Del. complaint filed Aug. 21, 2000).

[4] *See* Martha E. Williams, *Highlights of the Online Database Industry and the Internet: 2000, in* Proceedings of the 21st Annual National Online Meeting 1 (Martha E. Williams ed., 2000) ("Looking at the growth in databases, producers of databases, and vendors of database services over the time period from 1975 through 1999, the databases have grown by a factor of 39 . . . . The number of records contained in the databases has grown disproportionately. In 1975 the 301 databases contained about 52 million records. The 11,681 databases in 1999 contained nearly 12.86 *billion* records for a growth by a factor of 242.") (emphasis added).

Before the advent of digital research tools, scholars and historians were dependent principally on index-based systems, such as the *Readers' Guide to Periodical Literature* and its counterparts in countless disciplines, to access original source materials.[5] The researcher invariably began a given project by using the traditional and limited information access points—namely, title, author and subject fields. After carefully parsing the index and identifying a seemingly relevant reference, the researcher was required physically to retrieve, if possible, or request through interlibrary loan, if necessary, each and every relevant reference in cumbersome hard copy or microfiche/microfilm format. Using these traditional analog tools, even the most straightforward (*e.g.*, single-source) projects often required a significant investment of time and patience. These efforts were exponentially more complicated and burdensome when research, as is typically the case, required consideration of numerous publications, across a multitude of time periods.

With the advent of electronic libraries such as NEXIS, WESTLAW, Dow Jones Interactive and Dialog, a research project which, through the process described above, would have taken a researcher hours, days or more, can now potentially be completed in a matter of minutes. Searchable, comprehensive, full-text databases permit researchers to review quickly and efficiently hundreds, if not thousands, of print publications for the most detailed and minute references with a few keystrokes. Moreover, these technologies free the

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[5] *See* Vibiana Kassabian & Julie M. Still, *Selecting Full-Text Undergraduate Periodicals Databases*, EContent, Dec. 1, 1999 ("A long time ago, in a galaxy far, far away, the friendly but serious . . . librarians at a good undergraduate library could purchase a set of the Wilson indices—*Readers' Guide*, *Social Sciences Index*, *Humanities Index*, *Business Periodicals Index*, *Biological and Agricultural Index*, and *Applied Science and Technology Index*—and feel they were providing their students with solid, well-rounded access to the major periodical literature of various fields.").

researcher from the inherently limited index systems, the integrity of which are entirely dependent on the judgment and perception of the individuals charged with characterizing and describing the underlying content. Full-text archives of a relevant publication (*i.e.*, a periodical, journal or newspaper) for a specified time period provide scholars and researchers with direct access to the universe of potentially applicable source material, and the ability to parse it with a level of detail and at speeds that are simply not possible using traditional, index-based research tools and manual review. In contrast to analog research methods, the utility of the electronic database is limited only by the researcher's ability to formulate an effective search.

The immediacy of access, efficiency, accuracy, reliability and comprehensiveness offered by searchable full-text digital archives are but a few of the benefits historians and other researchers have reaped from the advancement in the technology of information. Perhaps of equal significance is the fact that digital periodical, newspaper and journal archives, regardless of where they are physically housed, can be accessed from any location where the appropriate technology is available.[6] Moreover, these materials can be accessed by countless people simultaneously at any time.[7]

II. DIGITAL TECHNOLOGY IS INCREASINGLY REPLACING, RATHER THAN SUPPLEMENTING, TRADITIONAL METHODS OF RECORDING AND ACCESSING THE NATION'S HISTORICAL RECORD.

Few will deny that the primary locus, or at least the starting point, of almost any historical research project today (and for

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[6] *See Commission on Physical Sciences, Mathematics, and Applications, National Research Council, LC21: A Digital Strategy for the Library of Congress* (2000) 3-3 [hereinafter *Library of Congress Report*].

[7] *Id.* at 3-4.

many years now) has migrated from the physical collections of libraries and archives to the desktop computer. Indeed, through digitization, the concept of "library" has been transformed from a "place" to a process of information management and collection.[8] The fundamental process of historical research remains the same, however, whether the historian is relying on traditional analog or digital research tools. In either case, the quality of the research is ultimately dependent on the skill of the researcher and the comprehensiveness and accessibility of the underlying source material.

Although traditional archives and libraries comprised of analog materials always will remain indispensable research tools, they no longer are the primary research tools. Those charged with overseeing the warehouses of our nation's collective memory, namely, the nation's research libraries and archives, have been at the forefront of employing digital technology to collect, store and maintain the historical record in its myriad forms. In recognition of the efficiencies inherent in managing information digitally, as well as the associated physical space and cost savings, the acquisition policies and infrastructure of our nation's libraries and archives have undergone a significant transformation. Less and less frequently do they maintain parallel information systems in traditional print media and electronic forms.[9]

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[8] *See* Richard C. Rockwell, *Gateway Library: A View from the Periphery*, *in* Gateways to Knowledge 109 (Lawrence Dowler ed., MIT Press 1997).

[9] *See* Eli M. Noam, *Will Books Become the Dumb Medium?, Keynote Address to the Annual Convention of Educom* (Oct. 27, 1997), *in* Educom Review, March/April 1997, at 21 ("Comprehensive library collections have become unaffordable. But at the same time, electronic alternatives have become powerful in storage, broad-ranging in content and efficient in retrieval. Therefore, libraries are gradually shifting from investment in the physical presence of information to the creation of electronic access. Soon the combination of laptop and phone line will serve just as well—

Faced with the choice, the traditional print alternative is selected with increasingly less frequency.[10] Indeed, some observers predict that print media journal/periodical storage and retrieval systems will be the exception rather than the rule in the not-too-distant future.[11] Already, for many researchers, electronic databases represent the sole repository of comprehensive historical information on their topic of interest.[12] Moreover, for certain rare or fragile subject matter, digital media may offer the only viable means of salvaging materials for future generations.[13]

III. THE SECOND CIRCUIT'S DECISION WILL HAVE THE PREDICTABLE EFFECT OF IRREPARABLY UNDERMINING THE INTEGRITY OF THE NATION'S ELECTRONIC ARCHIVES AND THE PROGRESS OF HISTORICAL RESEARCH AND SCHOLARSHIP.

It is for these reasons that *amici* urge this Court to review the decision below. In an era when print archives of newspapers, journals and other periodicals are being rapidly replaced by electronic counterparts, the Second Circuit's decision will have the practical effect of dramatically and irreparably undermining the integrity of the historical record

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anywhere, anytime.").

[10] *See* Katie Hafner, *Books to Bytes: The Electronic Archive*, N.Y. Times, April 8, 1999, at G1.

[11] *See* Tracy Primich, *Electronic Collections in the Age of the Traditional Library*, EContent, April 1, 2000, at 65 (quoting the *1994 California State University Strategic Plan for Libraries* which sets as a goal the transformation of "expensive journals in high-use areas into their electronic equivalents as early as is financially feasible, but certainly within the next three to five years," ultimately predicting that the state university library system will "get out of the business of acquiring print-based journals altogether").

[12] *See Library of Congress Report*, *supra* note 6, at 1-17.

[13] *Id.* at 4-9, 6-2.

by limiting access to information and increasing the burdens on, and the costs of, scholarship.·

As a result of the Second Circuit's decision, publishers and database providers may not lawfully include in archival databases the works of freelance authors who have not explicitly granted the rights for further electronic archival publication of their respective journal, magazine or newspaper contributions. The threat of a tidal wave of lawsuits brought by freelance authors relying on the Second Circuit's decision will lead the nation's publishers and database providers to avoid the risk of liability by prophylactically eviscerating existing databases of significant materials, and not including certain works in electronic archives moving forward. From the perspective of *amici*, the potential damage wrought by this rule is inestimable because such "freelance" materials include, among other things, Op-Ed pieces and other invaluable contemporary commentary on the people and events of a given point in time.

The certainty of this devastating outcome becomes clear when the practical limitations involved in seeking and clearing freelance authors' rights are considered. *First*, in light of decades of common publishing industry practice, and given the long-standing and implicit understanding of publishers and freelance authors that authorization for inclusion of works in archival resources was not required, the publishing industry simply has not maintained the complete and accurate records necessary to seek and secure the permissions mandated by the Second Circuit's decision. Accordingly, many of the authors whose rights may be implicated, or their heirs and assigns, may be difficult, if not impossible, to locate. *Second*, even assuming the respective rights holder(s) can be located, in addition to the practical and administrative burdens associated with attempting to clear rights retroactively, the aggregate costs of paying individual rights holders for the necessary permissions to republish their respective contributions in electronic form will either be

passed on to individual and institutional end-users, or may simply be prohibitive, particularly for the publishers of small and/or specialized academic journals. *Third*, in terms of prospective effect, the Second Circuit's decision is no less damaging. Although it may be possible for publishers and database providers to secure in advance the necessary rights from freelance authors to publish back issues of newspapers and other periodicals in their entirety in electronic form, it is equally possible that freelance authors may deny granting such permissions, preferring instead that their individual works not be included in electronic archives regardless of the fees offered by the publisher.

The omission of these materials from the electronic databases, for any reason on a large scale or even an occasional basis, undermines the principal benefits that electronic archives offer historians—efficiency, accuracy and comprehensiveness. For the scholar, the uncertainty engendered by an incomplete archive presents a grave threat to the quality and completeness of historical scholarship, particularly where the gaps in coverage are not apparent or even detectable.

Faced with the prospect of unidentifiable gaps in coverage in the nation's electronic archive, and in order to guarantee thorough and accurate research, historians and researchers will, by necessity, be driven back to physical collections of libraries and archives to utilize, to the extent they now exist, the obsolete and inherently limited print-based indices and other analog information locating tools of prior generations. In light of the trends in library acquisition in favor of electronic media, however, researchers will return to a materially depleted analog universe, with a substantial portion of the historical record simply unavailable or, if available, difficult, costly and inconvenient to access. Against such a backdrop, and in view of increasing financial constraints on research libraries and archives, it is highly unlikely that all but a select few collecting institutions will be able consis-

tently to purchase electronic *and* analog versions of critical resources, with those that do likely being forced to pass on the costs to downstream users. Moreover, because of the fundamental shift in favor of electronic media among the nation's libraries, archives and research institutions, it may simply be too late to return to analog approaches as the principal means of information storage and retrieval. The vast majority of libraries and archives will, therefore, be left with an unenviable choice between facilitating access and providing complete access to critical resource materials.

In sum, therefore, *amici* respectfully submit that the Second Circuit's decision will have the unprecedented and undesirable two-fold effect of threatening the completeness and integrity of the nation's electronic archives, and decreasing access to convenient, cost-efficient, comprehensive electronic information resources available to historians, scholars and researchers, as well as the public at large. An outcome of such momentous importance to the integrity of our nation's collective historical record and the progress of historical scholarship should not occur without consideration by the Court.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL F. CLAYTON
Counsel of Record
BRETT I. MILLER
ANITA G. BLUMENTHAL
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000

October 2, 2000